United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

74-2037

IN THE UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 74-2037

UNITED JEWISH ORGANIZATIONS OF
WILLIAMSBURGH, INC., et al.,

Plaintiffs-Appellants

v.

MALCOLM WILSON, et al.,

Defendants-Appellees

On Appeal from the United States District Court for the
Eastern District of New York

BRIEF FOR APPELLEE SAXBE

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Defendants-Appellees.	)	

BRIEF FOR APPELLEE SAXBE

PRELIMINARY STATEMENT

This is an appeal from an order and decision of Senior District Judge Walter Bruchhausen of the Eastern District of New York dismissing the plaintiffs' complaint and denying the plaintiffs' motion for a preliminary injunction.

QUESTIONS PRESENTED

1. Whether the court below has jurisdiction to review a determination by the United States Attorney General pursuant to Section 5 of the Voting Rights Act.

2. Whether appellants, individual citizens who represent a community organization, have standing to seek judicial review of a determination by the United States Attorney General pursuant to Section 5 of the Voting Rights Act.

3. Whether the fourteenth or fifteenth amendments to the United States Constitution or the Voting Rights Act guarantee individuals who represent a religious or ethnic community compact and contiguous districts which maintain the unity of the community.

STATEMENT

Appellants instituted this action to enjoin the implementation by the State of New York of the redistricting plans for the Kings County Congressional, Senatorial and Assemblymanic districts which were enacted on May 29, 1974, in response to the objection of the United States Attorney General

under Section 5 of the Voting Rights Act of 1965, as amended, 42 U.S.C. 1973c, to Chapters 11, 76, 77, and 78 of the New York Laws of 1972 in so far as these chapters relate to the above-mentioned districts. Appellants also seek a judgment declaring that the standards utilized by the United States Attorney General and his agents in objecting to the implementation of the above-mentioned plans were unconstitutional and improper.

The United States Attorney General's review of the New York reapportionments came about as the result of an order entered on January 10, 1974, by the three-judge District Court for the District of Columbia in New York v. United States, Civ. No. 2419-71 (D.D.C.). This order rescinded a previous declaratory judgment obtained by the State of New York exempting it from coverage of the Voting Rights Act. 1/ The order determined as well that pending final litigation New York, Bronx, and Kings Counties would be subject to the provisions of the Act.

1/Because less than 50% of the registered voters in the counties of Kings, New York, and Bronx voted for a presidential election, those counties were automatically subject to the provisions

(Footnote continued on next page)

On January 31, 1974, the New York Attorney General acting on behalf of Bronx, Kings, and New York Counties, submitted these Chapters of the New York Laws of 1974 that related to the Congressional, Senate, and Assembly district

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(Footnote continued)

within Sections 4 and 5 of the Voting Rights Act of 1965, as amended, 1970, 36 Fed. Reg. 5809 (March 27, 1971). In December of 1971 the State of New York seeking an exemption to coverage under the Act filed suit on behalf of those three counties for a declaratory judgment that during the ten years preceding the filing of the Suit the voter qualifications prescribed in the New York laws did not deny or abridge the right to vote of any individual on account of race or color. In April of 1972 the United States consented to the judgment since it did not find significant evidence of such racial discrimination, and on April 15, 1972, the District Court for the District of Columbia entered a declaratory judgment for plaintiff thereby relieving Kings, New York, and Bronx Counties of any obligation to comply with the provisions of the Voting Rights Act.

Subsequently, as a result of a decision by the District Court for the Southern District of New York in Torres v. Sachs, 73 Civ. 3921 (S. D. N. Y., September 26, 1973), which held that the conduct of elections in the City of New York solely in the English language was as a matter of law violations of the rights of non-English speaking Puerto Rican citizens, the United States moved the District Court for the District of Columbia to reopen the declaratory judgment of April 13, 1972. On November 5, 1973, the motion to reopen was granted, and on

(Footnote continued on next page)

lines in the three counties. On April 1, 1974, the United States Attorney General interposed an objection to the Kings County Congressional, Senatorial, and Assemblymanic lines and the New York County Senatorial and Assemblymanic lines. (See Appendix A.)

Pursuant to the United States Attorney General's objection, the New York State Reapportionment Committee redrew the lines and on May 29, 1974, the New York State Legislature met in special session to enact new redistrictings. On June 11, 1974, this action was instituted. Appellants initially sought a temporary restraining order to enjoin the gathering of signatures in certain districts. After a hearing on June 17, this application was denied. Following this denial, Appellee State of New York and applicants for intervenor, NAACP, each moved to dismiss the action.

(Footnote continued)

January 10, 1973, the previously granted declaratory judgment was rescinded. On April 30, 1973, the district court for the District of Columbia granted the intervenor NAACP's motion for summary judgment thereby finally denying the declaratory judgment sought by New York. Both the Court's interlocutory order of January 10, 1973, and the final denial of the declaratory judgment are on appeal to the United States Supreme Court.

Attorney General Saxbe moved to be dismissed as a party defendant on the grounds, first, that the Court below lacked jurisdiction to hear the allegations against him since any relief against him would be grantable, if at all, solely by the District Court for the District of Columbia pursuant to Section 5 of the Voting Rights Act; and secondly, it was urged that appellants lack standing to bring such a suit. A hearing was held on June 20 on appellants motion for preliminary injunction. On the basis of the evidence presented, plaintiffs moved for summary judgment.

On July 1, 1974, before Judge Bruchhausen reached a decision on the merits, the Department of Justice notified the Attorney General for the State of New York that no objection would be interposed with respect to the new 1974 lines. Because the public response to the redistricting was widespread and public comments were so intense and numerous the Justice Department released its memorandum of decision analyzing the major issues presented by the reapportionments. (See Dept. of Justice, Memorandum of Decision, July 1, 1974, attached as Appendix B.)

On July 12, 1974, the plaintiffs appealed the failure of the district judge to issue a quick decision. This Court dismissed the appeal without prejudice to renewal.

On July 25, 1974, Judge Bruchhausen dismissed the action in its entirety and from that decision appellants filed this appeal. We now respectfully urge that the decision of the district court be affirmed because the Voting Rights Act does not contemplate that the United States Attorney General's determination pursuant to Section 5 not to object may be reviewed by any court and that only the United States District Court for the District of Columbia may hear any claim raising substantive Section 5 issues. Insofar as plaintiffs allege that their rights under the Fourteenth and Fifteenth Amendments have been violated by the 1974 reapportionments, we submit that appellants are not constitutionally entitled to a reapportionment which satisfies their desire to constitute a district of their own choosing.

ARGUMENT

I.

THE COURT BELOW HAS NO JURISDICTION TO ENTERTAIN A SUBSTANTIVE SECTION 5 CLAIM SINCE SUCH CLAIMS MAY BE HEARD ONLY BY THE DISTRICT COURT FOR THE DISTRICT OF COLUMBIA IN A DECLARATORY JUDGMENT ACTION UNDER SECTION 5 OF THE VOTING RIGHTS ACT

At the outset it should be observed that the Attorney General is a defendant in this lawsuit solely because of his actions taken pursuant to responsibilities placed upon him by virtue of Section 5 of the Voting Rights Act (42 U.S.C. 1973c). Pursuant to that legislative mandate, the Attorney General is charged with the responsibility of determining whether changes in voting procedures have the purpose or effect of discriminating on the basis of race or color (see, e.g., 42 U.S.C. 1973c; 28 C.F.R. 51, et seq.).

Appellants' primary contention is that as a result of the United States Attorney General's determination of April 1, 1974, that portions of the 1972 reapportionments in Kings County had the effect of abridging the right to vote of the county's Black and Puerto Rican community on account of race

or color, the State of New York was required under color of federal law to redraw the district lines by applying racial quotas and engaging in racial gerrymandering. Appellants' argument is, therefore, a substantive attack upon the Attorney General's decision making process. The extraordinary nature of the Voting Rights Act in general, and Section 5, in particular, preclude either the court below or this Court from entertaining such claims.

Section 14(b) of the Voting Rights Act of 1965, 42 U.S.C. 1973L(b), provides that "no court other than the District Court for the District of Columbia ... shall have jurisdiction to issue any declaratory judgment pursuant to Section 4 or Section 5 ..." 42 U.S.C. 1973b(a). Section 4 and 5 expressly provide for two types of declaratory judgment actions: (1) under Section 4a by a state or political subdivision for a declaratory judgment that no "test or device" has been used during the ten years preceding the Filing of the action for the purpose or with the effect of denying or abridging the right to vote on account of race or color; and (2) under Section 5 by a state or political subdivision for a declaratory judgment that any voting qualification or prerequisite to voting or standard, practice, or procedure enacted or sought to be administered by the state different from that in force or effect on November 1, 1968, "does not have the purpose and will not have the effect of denying or abridging the right to vote on account of race or color ..." 42 U.S.C. 1973(c). 2/

2/This procedure can be utilized by a covered state or political subdivision prior or subsequent to a determination of the Attorney General under this section, 42 U.S.C. 1973(c).

The Supreme Court has made it clear that the only Section 5 issues that a three judge court outside the District of Columbia has jurisdiction to determine is whether a new state enactment is governed by Section 5 and to enjoin the particular enactment from further enforcement, pending the State's obtaining clearance under Section 5.

In Allen v. State Board of Elections, 393 U.S. 544 (1969) the Court distinguished the type of federal district court jurisdiction in Section 5 actions brought by the State from those maintained by private individuals by holding that:

> A similar distinction is possible with respect to declaratory judgments. A declaratory judgment brought by the State pursuant to §5 requires an adjudication that a new enactment does not have the purpose or effect of racial discrimination. However, a declaratory judgment action brought by a private litigant does not require the Court to reach this difficult substantive issue. The only issue is whether a particular state enactment is subject to the provisions of the Voting Rights Act, and therefore must be submitted for approval before enforcement. The difference in the

> magnitude of these two issues suggests that Congress did not intend that both can be decided only by the District of Columbia District Court. Indeed, the specific grant of jurisdiction to the district courts in §12(f) indicated Congress intended to treat "coverage" questions differently from "substantive discrimination" questions. 3/

In Perkins v. Matthews, 400 U.S. 379 (1971), the Court reiterated its view that suits for substantive Section 5 determinations may only be entertained by the District Court for the District of Columbia. In this regard the Court found that:

> . . . Allen . . . explicitly held that, as between the United States District Court for the District of Columbia and other district courts "Congress intended to treat 'coverage' questions differently from 'substantive discrimination' questions," 393 U.S. at 559, and therefore: "we do not consider whether this change has a discriminatory purpose or effect." 393 U.S. at 570. This is not to say that a district court limited to deciding a "coverage" question

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3/ 42 U.S.C. 1973j(f) provides that "[t]he district courts of the United States shall have jurisdiction of proceedings instituted pursuant to this section and shall exercise the same without regard to whether a person asserting rights under the provisions of the Act shall have exhausted any administrative or other remedies that may be provided by law."

> should close its eyes to the congressional purpose in enacting §5--to prevent the institution of changes which might have the purpose or effect of denying or abridging the right to vote on account of race or color, for Congress meant to reach "the subtle, as well as the obvious, state regulations . . ." which may have that effect. 393 U.S., at 565. What is foreclosed to such district court is what Congress expressly reserved for consideration by the District Court for the District of Columbia or the Attorney General--the determination whether a covered change does or does not have the purpose or effect "of denying or abridging the right to vote-on account of race or color." (Emphasis added) 400 U.S. at 385-5.

Thus the Supreme Court's holding in both Allen and Perkins demonstrate that an action, such as this, attacking a substantive Section 5 determination of the Attorney General, may be brought only in the District Court for the District of Columbia, i.e., the only jurisdiction where substantive Section 5 issues may be heard.

Additionally, this court has no jurisdiction since the Administrative Procedure Act expressly precludes review of a Section 5 determination. First, the statute and its legislative history indicate that the intent of the Congress

was to preclude judicial review of any determination by the Attorney General under Section 5 and, second, the decision of the Attorney General under Section 5 is a matter "committed to agency discretion by law." (5 U.S.C. 701(a)(1) and (2). 4/

The purpose of that portion of Section 5 which authorizes submission of voting changes to the Attorney General in lieu of the more cumbersome declaratory judgment procedure was to afford a rapid means of rendering a new

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4/ Inasmuch as a decision by the Attorney General under Section 5 is dispositive only at the preclearance stage and does not conclude the rights of affected parties, it would seem that the determination of the Attorney General is one "committed to agency discretion by law" [see 5 U.S.C. 701(a)(1)(2)], and is therefore unreviewable under the Administrative Procedure Act. Courts have uniformly held that such determinations made by the Attorney General which do not conclude the rights of the parties are unreviewable. See e.g., United States v. Greenwood Municipal Separate School District, 406 F. 2d 1086 (5th Cir. 1969); Plaquemines Parish School Board v. United States, 415 F. 2d 817 (5th Cir. 1969); Kennedy v. Lynd, 306 F. 2d 222 (5th Cir. 1962), cert. denied 371 U.S. 952; United States v. Gray, 315 F. Supp. 13 (D. R.I. 1970); United States v. Mitchell, 313 F. Supp. 299 (N.D. Ga. 1970).

state election law enforceable. See e.g., Allen v. State Board of Elections, 393 U.S. 544, 549 (1969); Hearings on S. 1564, before the Senate Committee on the Judiciary, 89th Cong., 1st Sess., pt.1, at 237 (1965). In light of the broad range of voting practices that were expected to covered by Section 5, 5/ the Congress deemed it appropriate to provide an expeditious method by which covered states and political subdivisions could implement proposed voting changes.

The objective of obtaining rapid preclearance of voting changes is clear from the face of the statute by its provision requiring the Attorney General to interpose any objection within 60 days of submission. Any review of the Attorney General's determination would be likely

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5/ Section 5 extends not only to reapportionment plans, Georgia v. United States, 411 U.S. 526 (1973) but also to such changes as the mode of casting write-in ballots, location of polling places, and annexations. 393 U.S. at 564-71; 400 U.S. at 387-88, 394.

to result in time-consuming and protracted litigation, thereby preventing the rapid determination of the enforceability of these proposed voting changes.

While the legislative history of the Voting Rights Act of 1965 does not expressly address the issue of judicial review under the Administrative Procedure Act of decisions of the Attorney General under Section 5, yet we respectfully submit that the need to provide a method of prompt review under Section 5 demonstrates that judicial review of such determinations is not available because "there is persuasive reason to believe that such was the purpose of Congress." Abbott Laboratories v. Gardner, 387 U.S. 136, 140 (1967).

While there have been four decided cases involving the issue of the reviewability of the Attorney General's determination under Section 5, only one, Common Cause v. Mitchell, Civ. Action No. 2348-71 (D.D.C., March 20, 1972) suggests an analogy to the instant case. In Common Cause

plaintiffs sued to overturn a determination made by the Attorney General pursuant to Section 5. The District Court there granted the government's motion to dismiss and held specifically that:

> 42 U.S.C. §1973c does not require the Attorney General to make determinations that are subject to the adjudicative and judicial review provisions of the APA, 5 U.S.C. §551, et seq." Id.

While several other decided cases would appear to support the proposition that the Attorney General's Section 5 determination is reviewable, in no instance was the District Court for the District of Columbia faced with the problem of reviewing an actual determination by the Attorney General. 6/

6/See Evers v. State Board of Election Commissioners, 327 F. Supp. 640 (S.D. Miss. 1971), app. dismissed, 405 U.S. 1001 (1972), where plaintiffs brought suit in an instance where the Attorney General had failed to make a decision under Section 5 and informed the submitting authority that: "I want to make clear that no inference of approval or disapproval is to be drawn from the failure of the Attorney General to object within the statutory period. The fact is that we have been unable to reach a decision within the allotted time on the basis of available evidence." Id. at 643. The district court there merely enjoined the implementation of the law in question until the state had obtained the necessary Section 5 clearance. The Court did not require the Attorney General to make a determination, since he was not a party to the lawsuit nor, of course, did it attempt to review his determination since in the court's opinion none had been rendered.

In Harper v. Richardson, Civ. Action No. 73-1766 (D.C.D.C. 1972) where plaintiffs sued to force the Attorney General to review the reapportionment of the South Carolina senate which reapportionment had been the subject of a three-judge district court order in Twiggs v. West, Civ. Action No. 71-1106 (D.S.C. May 23, 1972) the District Court for the District of Columbia found that the Attorney General could not lawfully defer to the decision of that court and required him to make a Section 5 determination without considering the decision in Twiggs v. West, supra. 7/ In Perkins v. Kleindienst, Civ. Action 1309-72 (D.C.D.C. Nov. 2, 1972), plaintiffs brought suit challenging the Attorney General's determination of non-objection to voting changes in Canton, Mississippi. Although the

7/On July 20, 1973 the Attorney General informed the State of South Carolina that pursuant to the Court's order he must interpose an objection to Act 1205. On September 12, 1973 the United States filed a notice of appeal from the Court's order of July 19, 1973 finding that the Attorney General may not lawfully defer to the decision in Twiggs where the three-judge court found that the Senate plan comported with fifteenth amendment requirements. Briefs have been submitted to the Court of Appeals for the District of Columbia, in Harper, however, as of this date no date has been set for oral argument.

district court did require the Attorney General to make a "reasoned decision" as to the discriminatory effect of the voting changes, yet after rendering that decision the district court of its own motion dismissed the case on the ground that "[t]his aforesaid order of November 2, 1972 provides all the relief to which the plaintiffs are entitled." Thereafter, the defendant's appealed the district court's decision that the Attorney General must make a "reasoned decision" (No. 73-1492 and the plaintiffs appealed the court's dismissal of the case (No. 73-1326). During the pendency of these appeals the Attorney General without waiving his appeal rights, filed a "reasoned decision" in accordance with the district court's order. 8/ Because the parties at that time mutually agreed at that stage of the proceedings to dismiss the appeals in that lawsuit the district court never was presented with the question of whether the Attorney General's more detailed justification of his determination not to object was supportable. It would appear, to the contrary, that the

8/Memorandum of the United States in Response to the Court's Order of November 2, 1972, in Perkins v. Richardson, Civ. Action No. 1309-72 (D.C.D.C. 1972).

district court's dismissal of the action in that case would support a view that the court there did not believe it had any jurisdiction to review the conclusion ultimately reached by the Attorney General through the "reasoned decision" ordered by it.

In the instant case, plaintiffs attempt to confer jurisdiction upon the court below, and thus, this court, to review an objection of the Attorney General under Section 5. It is clear, however, that not only did the Court below and, therefore, this court lack jurisdiction but also that even if plaintiffs had brought their claim in the District Court for the District of Columbia the above discussed cases imply that even that court would not have jurisdiction to hear the allegations of these contestants.

II.

APPELLANTS LACK STANDING TO SEEK JUDICIAL REVIEW OF A DETERMINATION BY THE ATTORNEY GENERAL PURSUANT TO SECTION 5 OF THE VOTING RIGHTS ACT

The claims against the United States Attorney General, while not characterized as such, constitute, in essence, an attempt to confer upon this Court authority to hear a substantive Section 5 issue brought by private plaintiffs. It has been demonstrated that such actions may only be brought in the District Court for the District of Columbia and only by a state or affected political subdivision.

In this regard the Supreme Court in Allen v. State Board of Elections, 393 U.S. 544, 561 (1969) enumerated the class of parties who could bring suits under Section 5:

> As we interpret Section 5, suits involving the section may be brought in at least three ways. First, of course, the State may institute a declaratory judgment action. Section, an individual may bring a suit for declaratory judgment and injunctive relief, claiming that a state requirement is covered by Section 5, but has not been subjected to the required federal scrutiny. Third, the Attorney

> General may bring an injunctive action to prohibit the enforcement of a new regulation because of the State's failure to obtain approval under Section 5.

In the instant case, while plaintiffs do not invoke Section 5 or the Voting Rights Act as a predicate for jurisdiction, their attack upon the Attorney General's Section 5 determination or April 1, 1974, implicitly requires that this Court review that determination.

The plaintiffs in this instance do not purport to represent the three covered counties but assert instead that as private parties they may maintain the action against defendant Saxbe. However, the Supreme Court in Allen made clear the instances in which private parties, such as the instant plaintiffs, may maintain suit. The Court said, at 393 U.S. 555:

> Analysis of this language [Section 5] in light of the major purpose of the Act indicates that [private parties] may seek a declaratory judgment that a new state enactment is governed by Section 5. Further, after proving that the State has failed to submit the covered enactment for Section 5

> approval, the private party has standing to obtain an injunction against further enforcement, pending the State's submission of the legislation pursuant to Section 5.

Nothing in Allen supports the proposition that private parties have standing to attack a Section 5 judgment of the Attorney General. Furthermore, nothing supports the proposition that the plan upon which the State decided was at the insistence of the United States. In fact, as the Memorandum of Decision of the Department of Justice clearly emphasizes:

> (I)t is not the function or authority of the Attorney General under Section 5 to devise redistricting plans, or for that matter to dictate to the State of New York specific actions, steps or lines with respect to its own redistricting plan. The only function of the Attorney General under Section 5 is to evaluate a voting change, such as that encompassed in the instant submission, once it has been adopted by the state and submitted for the Attorney General's review, and to determine the limited question of whether the purpose or effect of the change in question is to deny or abridge the right

> to vote on account of race or color. If no such abridgment or denial exists, the Attorney General must not object to the plan, regardless of the merits or demerits of the plan in other regards, including state, local, and partisan political ones. If an abridgment or denial does exist - as we found in the first submission by New York - the Attorney General must object, stating his reasons, but not drawing a counter plan or commanding any particular state response.

(United States Department of Justice, Civil Rights Division, Memorandum of Decision, July 1, 1974, p. 17).

III.

NEITHER THE FOURTEENTH NOR THE FIFTEENTH AMENDMENTS GUARANTY SEPARATE COMMUNITY RECOGNITION IN THE REAPPORTIONMENT PROCESS

Appellants contend that apart from their aggrievement by the application of unconstitutional and improper standards by the Attorney General in reaching his Section 5 determination, they have standing to sue in that the 1974 Kings County reapportionments (particularly the Senate and Assembly redistrictings) unconstitutionally dilute and minimize their voting strength. Even assuming, arguendo, the existence of such standing, we submit that the appellants do not have a right to any particular form of districting, particularly as against the Attorney General.

Appellants by their own definition are representatives of a closely knit Hasidic Jewish community in the Williamsburgh area of Brooklyn (Kings County). The effect of the 1974 reapportionment was to split their community into more than one Senate and Assembly district. While appellants may have standing, in the strict sense of that term, to sue under the Fourteenth or Fifteenth amendments to the

Constitution alleging as they do that they are aggrieved by the reapportionment, we have grave doubts that anything in the Constitution guarantees to religiously or ethnically based communities separate community recognition in the redistricting process.

In this regard, recent reapportionment cases focus on two themes which interact to form the basis for determining the constitutionality of reapportionments. The first is the familiar axiom that an apportionment of voting districts be accomplished to assure that one person's vote equals another's as nearly as practicable. The legal foundation for this rule lies in the Fourteenth amendment. The second theme is that an apportionment scheme not operate to cancel out cognizable racial elements of the voting population. The Fifteenth amendment creates the basis for this theory. White v. Regester, 412 U.S. 755 (1973); Whitcomb v. Chavis, 403 U.S. 124 (1971).

Certainly, nothing in the Fourteenth Amendment one man-one vote line of cases, beginning with Baker v. Carr, 369 U.S. 186 (1962), implys that private individuals have a right to particular form of reapportionment. Nor do the Fifteenth Amendment reapportionment cases establish a right in a strictly religious or ethnic based community to be preserved within one district. Fifteenth Amendment actions have in the past generally occurred in instances where the voting rights of blacks in the deep south have been denied or abridged on account of race. This limitation is the result of the extraordinary history of discrimination suffered by the black citizen minority in its attempt to gain access to the political process. The Voting Rights Act of 1965 was primarily enacted to confer upon black citizens the Fifteenth Amendment protections which had been so long denied then; although it is clear that protection under the Act has been afforded to Indians 9/

9/Apache County v. United States, 256 F. Supp. 903 (D.C.D.C. 1966).

and Puerto Ricans, 10/ in areas where these groups comprise a significant minority population, yet have been denied full participation in the electoral process by the purpose or effect of such obstacles as "grandfather clauses" and literacy tests.

By contrast, the protections of the Fifteenth Amendment and the Voting Rights Act have never been extended to ethnic minority groups or religiously based communities which have not been found by Congress to have suffered a long history of discrimination in the registration and voting processes.

CONCLUSION

The judgment of the district court should be affirmed for the reasons expressed above.

Respectfully submitted,

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10/42 U.S.C. §1973b(e). Puerto Rican Organization for Political Action v. Kusper, 72 Civ. 2312 (7th Cir., Dec. 8, 1973).

APPENDIX A

JUL 1 1974

Mr. George D. Zuckerman
Assistant Attorney General
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State of New York
Two World Trade Center
New York, New York 10047

Dear Mr. Zuckerman:

This is in reference to your submission to the Attorney General under Section 5 of the Voting Rights Act on behalf of Kings and New York Counties of Chapters 588, 589, 590 and 591 of the Laws of 1974 which revise some of the assembly, senatorial and congressional districts. This submission was made on May 31, 1974 and, in accordance with your request, expedited consideration has been given to this submission pursuant to the procedural guidelines for the administration of Section 5 (28 C.F.R. 51.22).

The Attorney General does not interpose any objection to the implementation of these acts. However, we feel a responsibility to point out that Section 5 of the Voting Rights Act expressly provides that the failure of the Attorney General to object does not bar any subsequent judicial action to enjoin enforcement of such provisions.

Because the large volume of public comments we have received concerning this submission precludes us

individual response to each person who has expressed a view concerning this legislation, we are making public our staff analysis of the major issues raised, a copy of which is enclosed for your information.

Sincerely,

J. STANLEY POTTINGER
Assistant Attorney General
Civil Rights Division

APPENDIX B

UNITED STATES DEPARTMENT OF JUSTICE

CIVIL RIGHTS DIVISION

IN THE MATTER OF Chapters 588, 589, 590 and 591 of the Laws of 1974 Amending New York State Law in Relation to Certain Congressional, Assembly and Senate Districts in Kings and New York Counties, New York.

NOS. V6541 Thru

MEMORANDUM OF DECISION

July 1, 1974

Background

The instant submission was received on May 31, 1974 accompanied by a request for expedited consideration in anticipation of the beginning of the state's pre-election calendar on June 17, 1974. On the date of receipt, notice of submission and notice of the request for expedited consideration were mailed to persons listed on the Registry of Interested Persons as required in Civil Rights Division procedural guidelines.

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This submission addresses the objection filed on behalf of the Attorney General on April 1, 1974 to Chapters 11, 76, 77 and 78, New York Laws of 1972. In that determination the Attorney General was unable to conclude that specified portions of the redistricting plan in the covered jurisdictions of Kings and New York County did not have a discriminatory effect on the voting rights of Black and Puerto Rican residents. At the request of members of the staff of the Joint Legislative Committee on Reapportionment attorneys of this office met with them to discuss the Attorney General's objection to the end that the state legislature could have a better understanding of methods of eliminating the dilutive effect of the prior plan. The Joint Committee staff was advised that in any such matter as districting there were a number of alternatives, that it was the State's responsibility to design the districts, and that this Department had no interest in any particular plan.

The present revisions were adopted at a special legislative session on May 29, 1974. For the most part the legislature accepted the Joint Committee's recommendations.

Public comments on the revised district lines have been intense and voluminous. With respect to one senatorial district alone we have received petitions signed by over 7,000 citizens. We have also received comments from representatives of racial and ethnic minority groups, neighborhood organizations, political candidates, members of the legislature, church groups and service clubs. The revisions have also been the subject of a number of news stories and editorial comments in news media serving the affected areas. Our staff has read and evaluated each such comment.

The comments fall into several general classifications. An examination of each indicates that there is no reasonable basis for entering a further objection under the Voting Rights Act and we recommend that no objection by the Attorney General be interposed to implementation of this plan. In this connection, it is important to note that we do not have standing to evaluate, and express no opinion as to, legal issues not within the scope of the Voting Rights Act. Complaints about the state's reapportionment plan which do not relate to an alleged purpose or effect of discrimination on the basis of race or color are not cognizable in the Justice Department's review, regardless of the merit or lack of merit such complaints may have.

Because there has been an unprecedented public interest in and comment on this submission, the following analysis sets forth our views on each of the major issues presented. Because the large number of persons commenting preclude a personal reply to each, we further recommend that this memoranda be released to the public and the press so that the basis for our action can be known generally.

Analysis of Issues

1. Scope of Attorney General's Authority to Review Matters Submitted Under Section 5, Voting Rights Act.

Section 5 of the Voting Rights Act provides that:

> Whenever a State or political subdivision [covered by the Act] shall enact or seek to administer any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1974, such State or subdivision may institute an action in the United States District Court for the District of Columbia for a declaratory judgment that such qualification, prerequisite, standard, practice, or procedure does not have the purpose and will not have the effect of denying or abridging the right to vote on account of race or color, and unless and until the court enters such judgment no person shall be denied the right to vote for failure to comply with such qualification, prerequisite, standard, practice, or procedure: Provided, That such qualification, prerequisite, standard, practice, or procedure may be enforced without such proceeding if the qualification, prerequisite, standard, practice, or procedure has been submitted by the chief legal officer or other appropriate official of such State or subdivision

> to the Attorney General and the Attorney General has not interposed an objection within sixty days after such submission, . . .

That a legislative reapportionment such as the one involved here constitutes a change within the purview of Section 5 was made clear by the Supreme Court in Georgia v. United States, 411 U.S. 526 (1973).

Guidelines promulgated by the Attorney General for the processing of submissions made to him under Section 5 (28 C.F.R. 51, et seq.) provide, at Section 51.19, that:

> Section 5, in providing for submission to the Attorney General as an alternative seeking a declaratory judgment from the U.S. District Court for the District of Columbia, imposes on the Attorney General what is essentially a judicial function. Therefore, the burden of proof on the submitting authority is the same in submitting changes to the Attorney General as it would be in submitting changes to the District Court for the District of Columbia. The Attorney General shall base his decision on a review of material presented by the submitting authority, relevant information provided by individuals or groups, and the results of any investigation conducted by the Department Justice.

> If the Attorney General is satisfied that the submitted change does not have a racially discriminatory purpose or effect, he will not object to the change and will so notify the submitting authority. If the Attorney General determines that the submitted change has a racially discriminatory purpose or effect, he will enter an objection and will so notify the submitting authority. If the evidence as to the purpose or effect of the change is conflicting, and the Attorney General is unable to resolve the conflict within the 60-day period, he shall, consistent with the above-described burden of proof applicable in the District Court, enter an objection and so notify the submitting authority.

Thus, pursuant to the guidelines, the Attorney General must use the same test in reaching his determination as would the District Court for the District of Columbia, i.e., whether the submitted change has the purpose or effect of denying or abridging the right to vote on account of race or color. These guidelines have been upheld by the Supreme Court as a reasonable interpretation by the Attorney General of his responsibilities under the Act. Georgia v. United States, 411 U.S. at 536-41.

With this view of the Attorney General's Section 5 responsibility in mind, we turn to an examination of the issues raised by this submission.

2. Failure to Hold Public Hearings

Many of the communications received by the Department of Justice complain of the absence of public hearings by the state in connection with its enactment of the revised plans under submission. A number of these communications suggest that the state's proceedings were carried on in secrecy in order to pursue an unfair political advantage.

From all that we can perceive, however, the matter of redistricting in the affected districts has received wide publicity in the New York news media since the time the Attorney General's objection was interposed on April 1, 1974. For example, on April 7, 1974, a four-column editorial captioned Albany Prepares for Redistricting to End Racial Inequities Here appeared in the New York Times newspaper. Among other statements in the editorial was one in the second paragraph declaring that "The redistricting, pending further litigation, is tentatively being set for special legislative session late next month." In other news articles appearing as early as April 2, 1974, the nature of the Attorney General's objection was discussed, including speculation that new districts would have to be devised by the legislature and approved by the Department of Justice by June 17, 1974, the date for commencing the circulation of qualifying petitions. (See, e.g., New York Times, April 2, and April 9, 1974). Thus, it seems clear that the impending revision of the district lines objected to by the Attorney General was widely publicized.

The absence of formal public hearings is conceded by the state and in some circumstances could properly be considered in our review. In justification for its failure to provide such hearings the state offered the following:

> Due to the extremely short period available to the Committee for completing its work and the countless hours required in effecting compliance with the New York State Constitutional block on the border rule, the Committee was unable to hold Public Hearings. However, participation by any legislator, individual, public or special interest group was most welcome. The Committee has received either directly or through the [state] Attorney General's office numerous suggested districting plans. While many of these were merely suggestions respecting specific Assembly, Senate or Congressional Districts, the Committe staff plotted every suggestion received. This information was of substantial assistance to the Committee, particularly with respect to policy determinations.

(Interim Report of The Joint Committee on Reapportionment, May 27, 1974, pp. 11-12.) The report went on to describe and discuss various suggestions and alternatives which were received from minority groups or individuals and considered by the Committee in arriving at the plans adopted. (Id. at pp. 12-13.)

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the correction of the conditions addressed in the Attorney General's objection and in the view of the Justice Department Staff expressed only professional considerations.

It appears, therefore, that even though no formal public hearings were held by the state, there was substantial public awareness of the issues being considered and that, in fact, there was significant contribution by interested parties. While full public hearings in a matter of this nature would in our opinion ordinarily be preferable, under the circumstances involved here we are unable to conclude that the state had no rational justification for dispensing with those hearings. In any event, we find nothing in the notice procedures used by the state which would warrant an objection by the Attorney General absent some other more substantive infirmity.

3. Applicability of the Voting Rights Act Provisions Involved.

The Voting Rights Act of 1965 was enacted primarily to enforce the Fifteenth Amendment to the Constitution of the United States and, thus, primarily to assure and protect the voting rights of black Americans. (Hearings on Voting Rights Bill H.R. 6400 before the House Committee on the Judiciary, 89th Cong., 1st Sess., at 9 (1965).) The special applicability of Section 5 preclearance requirements was specifically linked to the coverage formula of Section 4 of the Act so as to prevent the continued utilization by states and their subdivisions, primarily in the South, of mechanisms which made it more difficult

for such black citizens to register, vote, and thus participate fully in the political process. Because of the unique formula, specially conceived by the Congress, the applicability of Section 5 designedly fell more heavily on the southern States because of their history of denying and suppressing the black vote.

However, the burdens of Section 5 also fell upon other jurisdictions. Because of a combination of factors, the counties of Bronx, Kings and New York in the State of New York (all located within the City of New York) became subject to the constraints of the Act, 1/ and require preclearance of voting changes before implementation. Because New York City includes a myriad of racial and ethnic groups, an analysis of the racially discriminatory purpose or effect of a voting change involves considerations quite different from those involved in the southern basically black-white context. For this reason, a discussion of the various groups covered by the Voting Rights Act is appropriate. The groups in whose behalf complaints have been brought to our attention include Blacks, Puerto Ricans, Hasidic Jews, Irish, Polish and Italians.

The Voting Rights Act was enacted to "enforce the Fifteenth Amendment . . . and for other purposes." The Fifteenth Amendment commands that the right to vote shall not be denied or abridged on account of race, color or previous condition of servitude. Both the intent and purpose of the Fifteenth Amendment and the Voting Rights Act appears to have been primarily to eliminate discrimination against Negroes, a group which had been long subjected to discrimination in the voting process because of race.

1/ According to 1970 Census figures, there are more blacks in the Counties of Bronx, Kings and New York than in any single southern state covered by the Voting Rights Act.

While the legislative history and judicial interpretations of the Fifteenth Amendment do not identify what groups, if any, other than blacks may be protected by the Amendment, we conclude that Puerto Ricans in New York may be considered within the protections of the Fifteenth Amendment and the Voting Rights Act by virtue of both judicial precedent and Congressional determinations.

In drawing this conclusion we start with the Supreme Court's decision in Oregon v. Mitchell, 400 U.S. 112 (1970). The Court's decision in that case dealt with several aspects of the 1970 Voting Rights Act Amendments. 2/ The one of concern here involves the Court's holding constitutional the nationwide suspension of literacy tests.

Although the Court rendered a judgment in which five different opinions were written, eight justices found the ban on literacy tests could be sustained on the basis of the Fifteenth Amendment which prohibits denying or abridging the right to vote on account of race, color or previous condition of servitude. Mr. Justice Black, in his opinion, explicitly said that "the literacy test ban . . . is constitutional under . . . the Fifteenth Amendment." 400 U.S. at 132. He then referred at length to the evidence before the Congress showing low voter registration in areas with large Spanish-American populations and showing that similar difficulties confronted Puerto Ricans in New York. 400 U.S. at 132-33. Mr. Justice Brennan, with Justices White and Marshall concurring, found that the literacy tests could be banned under the Fifteenth Amendment, 400 U.S. at 235-236, in large measure because the negative impact of such tests fell "most heavily on blacks and persons of Spanish surname." See, e.g., 400 U.S. at 235. 3/

2/ Some aspects not relevant here included lowering the vo age to 18 for both federal and state elections, and requir all states to provide absentee registration and balloting opportunities for presidential elections.

3/ See also the opinions of Mr. Justice Harlan (400 U.S. a 216) and Mr. Justice Stewart (400 U.S. at 282), the Chief Justice and Mr. Justice Blackmun, concurring.

These opinions suggest that the Supreme Court found that the Congress had constitutional power under the Fifteenth Amendment to prohibit certain kinds of voting discrimination against at least some Spanish-surnamed Americans, and that the Congress had exercised this power in enacting the 1970 Amendments.

It should also be noted that lower court decisions have also indicated that some Spanish-surnamed Americans are covered by federal statutes which protect the rights of non-white citizens. 4/

Some support for the view that Puerto Ricans are protected generally by all of the provisions of the Voting Rights Act may be seen in the portion of that legislation which explicitly protects that group (Section 4e, 42 U.S.C. 1973b(e)(2)). Although Section 4(e) is predicated on the Fourteenth Amendment, whose design was primarily to address racial discrimination, the Congressional concern with Puerto Ricans may be read to indicate an intention to provide that group with the protection of all the provisions of the Voting Rights Act.

In contrast to the foregoing conclusion regarding Puerto Ricans, there was nothing revealed by our review of the circumstances surrounding the adoption of the Fifteenth Amendment, the passage of the Voting Rights Act and its Amendments, the language of those provisions, their legislative history, or the formula used for bringing states and political subdivisions under the Act which indicates that Hasidic Jews or persons of Irish, Polish

4/ See, e.g., Hernandez v. Erlenbusch, 368 F. Supp. 752 (D. Ore. 1973) and Puerto Rican Organization for Political Action, et al. v. Kusper, et al., 490 F. 2d 575 (7th Cir. 1973).

or Italian descent are within the scope of the special protections defined by the Congress in the Voting Rights Act. Nor has material supporting that view been brought to our attention by others. We are forced to conclude, therefore, that given what we now know of relevant precedent, these groups are not among those whose rights the Attorney General is commanded and empowered to protect in his consideration of a submission under Section 5 of the Voting Rights Act. We make no comment, of course, on the relative merits of this congressionally defined scope of coverage and nothing we say here sould be interpreted as affecting any other rights accruing to these parties from other sources.

We turn now to the substantive issues involved.

4. Kings County Congressional Plan - Complaints of Blacks and Puerto Ricans.

Our analysis of the Congressional districting reveals a basic situation of collectively mutual but individually conflicting interests of blacks and Puerto Ricans. We reach this conclusion because even though these groups as separate entities prefer to have controlling positions in any specific election contest, our review shows that in those instances where black or Puerto Rican candidates have "white" opposition, the two groups tend to unite behind the "minority" candidate. In our experience, this phenomenon provides a realistic and practical basis for assessing the effect of the redistricting within the meaning of Section 5.

Under the plan of districting submitted to the Attorney General on January 31, 1974, and to which an objection was interposed on April 1, 1974, Congessional districting showed the following in Kings County:

District #	Black	Puerto Rican
11 (part)	18.9%	8.8%
12	75.9%	13.5%
13	1.9%	1.8%
14	22.0%	24.0%
15	5.4%	8.4%
16	20.9%	3.5%

In evaluating this districting scheme the Attorney General concluded that:

> (W)ith respect to the Kings County congressional redistricting, the lines defining district 12 and surrounding districts appear to have the effect of overly concentrating black neighborhoods into district 12, while simultaneously fragmenting adjoining black and Puerto Rican concentrations into the surrounding majority white districts.

Our previous analysis showed that whites constituted 64.9% of the population of Kings County, blacks constituted 24.7% and Puerto Ricans constituted 10.4% of the population. Because of the combined concentration of blacks and Puerto Ricans in the affected area, the Attorney General concluded

that he could not certify that the voting strength of those affected groups had not been diluted and therefore, that he had to object to the implementation of that plan under the Voting Rights Act.

As noted above, the plan objected to by the Attorney General on April 1 provided for a district 12 which had a 75.9% black and 13.5% Puerto Rican population, or a combined "minority" population of 89.4%, and a district 14 which was 22% black and 24% Puerto Rican or 46% "minority." The revised plan, presently under submission, shows the following breakdown for those districts.

	Black	Puerto Rican	Combined
District 12	53%	19.2%	72.2%
District 14	45.1%	18.2%	63.3%

Some members of both the black and Puerto Rican communities have registered dissatisfaction with the lines as presently drawn.

According to Puerto Rican spokesmen, the Congressional districting is unsatisfactory because even though the new plan results in two districts with combined "minority" populations of 72% and 63%, the overall effect of the plan is to reduce the Puerto Rican strength from 24% in a single district (old district 14) to 19% (new district 12). They maintain that the plan has the effect of splintering off substantial numbers of Puerto Ricans into districts 11 and 16 and that a district could be created in which Puerto Ricans are a majority.

In order to test and evaluate these contentions we attempted to draw a theoretical plan which would create a majority Puerto Rican district. In addition, we carefully analyzed a plan suggested to us by Puerto Rican spokesmen. In our attempt to maximize Puerto Rican strength, our staff was able to construct a district with no more than 30.2% Puerto Rican population. Our analysis of the district proposed by the Puerto Rican spokesmen revealed a Puerto Rican population there of only 24.6%.

The construction of our alternative resulted in a reduction of the black percentage in what would be district 14 to 28% thus effecting a district which would have a minority population of 58%. The proposal espoused by the Puerto Rican spokesmen would have a 42.8% black population for a minority population of 67%. The former, under all views we have obtained, would not be a viable majority in New York City and the latter, though resulting from an effort to maximize Puerto Rican strength, does not reach the Puerto Ricans' desired goal of acquiring the predominant minority position in a district.

In addition, these theoretical plans result in districts which are not compact and contiguous. It is well to iterate at this point that according to 1970 Census figures Puerto Ricans constitute only 10% of the population of Kings County; that they reside in areas forming a corridor beginning in the Williamsburgh area, running along the northern fringe of the black Bedford - Stuyvesant area and into East New York; and, that the county must be divided into five districts and part of a sixth.

While the effort to maximize Puerto Rican voting strength did result in possible plans which would include a higher percentage of the Puerto Rican population in a single district than does the plan under submission, it is crucial to note that nothing in the law imposes any such duty on the state. Rather, the standard to be used is whether or not the plan as submitted minimizes or cancels out the voting strength of the minority. See, e.g., White v. Regester, 412 U.S. 755 (1973); Whitcomb v. Chavis, 403 U.S. 124 (1971). When the minority population percentage in the submitted plan is viewed against the percentages obtained in the maximized plans, we can hardly conclude that the plan under submission has that effect.

The basic complaint of some of the black representatives is that the new plan reduces the effectiveness of the black voting strength in the Kings congressional. They say that whereas under the old plan there was one "safe" district (district 12), where the 89.4% minority population could assure the election of a minority candidate, neither of the new districts, in which minorities predominate by 72% and 63% majorities, is high enough in minority population to be "safe." To support this contention they argue that the 72% and 63% figures may be accurate but still are not practical since registration among blacks and Puerto Ricans is significantly lower than among whites. As with the Puerto Ricans, the black complainants maintain that substantial concentrations of blacks and Puerto Ricans in the Oceanhill-Brownsville and Crown Heights area of Brooklyn could be included in what is district 14 of the plan under submission, thus lifting the minority percentage above 72% and 63% in both districts by virtue of the shifting of lines necessitated by such a move.

In assessing these arguments, two basic principles should be kept in mind. First, it is not the function or authority of the Attorney General under Section 5 to devise redistricting plans, or for that matter to dictate to the State of New York specific actions, steps or lines with respect to its own redistricting plan. The only function of the Attorney General under Section 5 is to evaluate a voting change, such as that encompassed in the instant submission, once it has been adopted by the state and submitted for the Attorney General's review, and to determine the limited question of whether the purpose or effect of the change in question is to deny or abridge the right to vote on account of race or color. If no such abridgment or denial exists, the Attorney General must not object to the plan, regardless of the merits or demerits of the plan in other regards, including state, local, and partisan political ones. If an abridgment or denial does exist - as we found in the first submission by New York - the Attorney General must object, stating his reasons, but not drawing a counter plan or commanding any particular state response.

Second, the Voting Rights Act does not guarantee that any particular candidate be elected, nor does it require that any persons actually exercise the voting rights protected by the Act. What it does do is assure that the opportunity of the affected minorities to participate freely in the electoral process, and thus elect a candidate of their choice, should not be unlawfully abridged.

In light of these principles, it becomes apparent that none of the contentions raised by these groups provide a basis for the Attorney General to object to the congressional redistricting under review. In addition to the fact that the law does not require the state to "maximize" minority voting strength through gerrymandering or other artificial

devices, the facts in this case - particularly the geographical dispersion of Puerto Rican neighborhoods throughout Kings County - show that it is virtually impossible to draw a majority Puerto Rican congressional district. They show further that even a 30% Puerto Rican district is attainable only by considerable gerrymandering. In this regard, and with respect to complaints of both groups, we repeat the test defined by the courts is not whether districts still more favorable to minorities can be drawn but, rather, whether the districts as drawn have the effect of minimizing minority voting strength.

As far as the blacks' argument on the meaning of the 72% and 63% majorities is concerned, in our view these population majorities, even allowing arguendo for a lower voting age population among blacks and Puerto Ricans, provide a realistic opportunity for minorities to elect a candidate of their choice. Whether or not those minorities choose to exercise their right by registering and voting is obviously a matter of great concern, but as a matter of law it is not one upon which the Attorney General can base an objection, at least not in the context of this submission.

5. Hasidic Jews and Other Ethnic Groups.

Perhaps the largest single group of complaints have come from the Hasidic Jewish community in the Williamsburgh area and from the Irish, Italian and Polish communities in North Brooklyn. These groups complain that the senatorial and assemblymanic districts, but primarily the senatorial districts, dilute their voting strength by splitting their communities into districts which join them with blacks and Puerto Ricans from the adjacent Bedford-Stuyvesant area. Particular

concern has been expressed over the division of the old senatorial districts represented by State Senators Chester Straub and Carol Bellamy. Petitions with over 7,000 signatures objecting to the senatorial redistricting in that area have been received.

While it is unquestionable that the redistricting done by the state in an effort to meet the prior objection of the Attorney General has affected the Hasidic Jewish community in Williamsburgh and the ethnic communities in North Brooklyn, the issues raised are not ones which the Attorney General has authority to determine under the provisions of Section 5 of the Voting Rights Act (See Section 3, above). The pendency of litigation in Eastern District of New York involving these districts regrettably precludes more extended discussion here.

6. New York County Senatorial Plan.

Another portion of the redistricting as to which major opposition has been received is the New York County senatorial plan. A history of this plan is appropriate to our review of this matter.

The Attorney General's objection to this aspect of the previous redistricting plan stated that:

> (T)he lines defining district 28 in West Harlem appear to reduce significantly the minority voting strength in that area. Significant portions of minority neighborhoods in that area (district 27 under the old plan) have been removed to proposed district 29 with apparent dilutive effect.

Under the plan then being evaluated, blacks and Puerto Ricans constituted 55.6% of district 28 and 47.3% of district 29.

In its efforts to meet the Attorney General's objection, The Joint Committee on Reapportionment devised a plan which resulted in a district 28 with a minority population of 82.8% and a district 29 with 27.5% minority population. However, one faction in the minority community prevailed upon the Committee to adopt instead an alternative in which district 28 had 64.1% minority population and district 29 had 44.1% minority. The latter plan is the one adopted by the state and presently under submission.

Perhaps the most documented opposition to this portion of the plan has come from the incumbent in the 71st Assembly District, Assemblyman Franz Leichter. Mr. Leichter's position is that the difference between the minority percentage in the plan objected to and the one under submission does not demonstrate that the districts have been so significantly changed as to meet the Attorney General's objection. In support of his position he points to inconsistencies in statistics provided by the state and argues that the difference between the two plans is even smaller than that reflected in the objectionable 55.6 and resubmitted 64.1 minority percentages furnished us by the state.

In addition to Assemblyman Leichter's complaint, some blacks have registered their dissatisfaction with district 28 and maintain, with some factual substantiation, that district 28 as submitted was designed solely to preserve the seat of the black incumbent.

We have evaluated in depth the contention of Assemblyman Leichter and find that while he is substantially correct in his claim of a statistical discrepancy, the error does not materially affect the lawfulness of the submission. The error related to calculations made in connection with the plan to which the Attorney General previously objected, so that whereas the state advised us that that plan had a minority percentage of 55.6%, the actual percentage was approximately 58.5% minority.

Because of that discrepancy, there is some merit to Assemblyman Leichter's argument that the difference is not as substantial as it appears and, given other circumstances, we might conclude, as he does, that the difference is insufficient to remove the previous objection. The fact is that even though the objection was based on our belief that district 28 was 55.6% minority, it is likely that the same result would have obtained had the more accurate percentage of 58.5% been known. However, under our analysis the 64.1% minority population in the instant plan is acceptable regardless of what the earlier figure actually was. Besides, as we note above, the Voting Rights Act assures affected minorities the opportunity for free participation in the political process. Where, as here, it is clear not only that minorities have participated in the political process, but that the plan was drawn as it is because of the insistence of a substantial faction of the minority community, we do not believe that the purpose of the Act would be served by an Attorney General objection. Again the question we must answer is not whether a plan might be conceived with a majority of blacks and Puerto Ricans even more decisive than the 64.1% majority now submitted by the state. Rather, the issue here is whether the adopted plan dilutes minority voting rights.

Nor do we find authority in the Act for the proposition that the Attorney General may, under the circumstances here, interpose an objection to a change on the ground that it is not satisfactory to all segments of the minority community.

For the foregoing reasons, we conclude that there is no basis for an Attorney General objection and recommend that an appropriate notification be mailed promptly to the submitting authority.

Respectfully submitted,

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APPROVED:

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CERTIFICATE OF SERVICE

I, S. Michael Scadron, hereby certify that on August 14, 1974, I served the foregoing Brief of Appellee Saxbe on the parties to this appeal by mailing two copies each of such brief, air mail, postage prepaid to:

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